

# NON-STATE ACTORS AND CULTURAL HERITAGE: FRIENDS OR FOES?

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## Resumen

*Los actores no estatales más activos y reivindicativos en el ámbito del patrimonio cultural son las organizaciones no gubernamentales (ONG), las empresas privadas, y los grupos armados no estatales. No cabe duda de que estos actores tienen un papel ambivalente. Por una parte, las organizaciones no gubernamentales, las empresas privadas y, sin duda, los grupos armados no estatales, contribuyen a la protección de los bienes culturales y al desarrollo del derecho y la política. Por otra, estas entidades también pueden tener un impacto perjudicial sobre la integridad de los tesoros culturales. La UNESCO –en cooperación con otros organismos– está desarrollando una estrategia de arriba hacia abajo para involucrar a estos actores no estatales en el respeto de las obligaciones fundamentales establecidas en los tratados de patrimonio cultural. La aspiración de la comunidad internacional de proteger los tesoros culturales para el bien de las generaciones presentes y futuras se verá comprometida si la UNESCO y las demás autoridades que supervisan la aplicación del régimen jurídico vigente no logran idear mecanismos eficaces para reducir incumplimientos y violaciones.*

## Abstract

*The most active and vocal non-State actors in the cultural heritage domain are non-governmental organizations (NGOs), private companies, and non-State armed groups. It is beyond doubt that these actors have an ambivalent role. On the one hand, NGOs, private companies and, arguably, non-State armed groups, contribute to the protection of cultural assets and the development of law and policy. On the other hand, these entities may have a deleterious impact on the integrity of cultural treasures. UNESCO –in cooperation with other bodies– is currently developing a top-down strategy to engage these non-State actors to respect the key obligations set forth in cultural heritage treaties. The international community's aspiration to protect cultural treasures for the sake of present and future generations will be compromised if UNESCO and the other authorities overseeing the implementation of the existing legal regime fail to devise effective arrangements to reduce non-compliance and violations.*

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### Palabras clave

*UNESCO; Actores no estatales; Organizaciones No Gubernamentales; empresas privadas; grupos armados no estatales; patrimonio cultural; derecho internacional del patrimonio cultural; derecho internacional humanitario.*

### Key words

*UNESCO; Non-State Actors; Non-Governmental Organizations; private companies; non-State armed groups; cultural heritage; international cultural heritage law; international humanitarian law.*

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## I. INTRODUCTION

THERE appears to be a steadily increasing interest in works of art and monuments. These are treasured by States, documented by specialists, used by living cultures, exhibited by museums, collected by individuals, bought and sold by dealers and auction houses. This widely shared interest is the underlying reason for the development of a complex legal framework regulating the protection of the cultural heritage of States and of nations within States. At the national level, almost all States have enacted legislation that recognizes the specificity of cultural objects and decides if, to what extent, and under which forms such materials should be subjected to specific legal regimes. These domestic regulatory systems vary in their contents but share a common feature: they provide more protective and less trade-oriented rules than the regimes normally applied to ordinary property (2). At the regional and international levels, various organizations have acted toward the building of a comprehensive protective regime because of the perception that domestic laws did not suffice. Several international instruments have been adopted, especially through the standard-setting activity of the United Nations Educational, Scien-

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(2) CARDUCCI, G., «The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations», en *Art and Cultural Heritage: Law, Policy and Practice*, HOFFMAN, B. (ed.), Cambridge University Press, Cambridge, 2006, p. 68 ss., pp. 69-70.

tific, and Cultural Organization (UNESCO) (3). Efforts in this direction have intensified over the past two decades. Treaties have been adopted to extend protection to new types of cultural heritage, such as the *Convention on the Protection of the Underwater Cultural Heritage* (4) and the *Convention for the Safeguarding of the Intangible Cultural Heritage* (5). During the same period, older instruments have been updated and completed. This has led, *inter alia*, to the adoption of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflicts* (6) and of the *Convention on Stolen or Illegally Exported Cultural Objects* of the International Institute for the Unification of Private Law (UNIDROIT). (7) At the same time, cultural heritage concerns have started to pervade other areas of international law as well as international adjudication. The result of this gradual process is that cultural heritage law now constitutes a distinct branch of international law that encompasses the safeguarding of sites, monuments, works of art, landscapes, as well as the practices, expressions, knowledge, skills that communities, groups and individuals recognize as part of their cultural heritage.

Needless to say, the mere existence of rules is not enough. What matters is the concrete enforcement of national and international legal instruments. In this field, as in other areas of international law, State action is essential for the implementation of the law through domestic legislation, monitoring and reporting activities, judicial application, and sanctions. However, other entities have a role to play with respect to the application of cultural heritage law, the so-called non-State actors.

Definitions of the term non-State actor diverge widely. According to one author, this term designates all entities: (i) largely or entirely autonomous from government funding and interference; (ii) emanating from civil society, market economy, or political impulses beyond State control; (iii) participating in networks which extend across the boundaries of two or more States; and (iv) acting in ways which affect political outcomes. (8) In addition, one can add that non-State actors (i) are collective entities composed of individual human beings; (ii) are organized in nature, in the sense that they have an internal structure and rules for the pursuit of the professed objectives; and (iii) operate for a certain period of time.

The most active and vocal non-State actors on the world scene are non-governmental organizations (NGOs), private companies, and non-State armed groups. Generally speaking, these entities play various roles in the field of cultural heritage. NGOs carry out a catalytic role in problem identification, negotiation, and development of regulatory regimes. They also support the implementation of treaty

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(3) See e.g. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (14 May 1954, 249 UNTS 240) (1954 UNESCO Convention); the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (17 November 1970, 823 UNTS 231) (1970 UNESCO Convention); and the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (16 November 1972, 1037 UNTS 151) (WHC).

(4) 2 November 2001, 41 *ILM* (2002) 37 (2001 UNESCO Convention).

(5) 17 October 2003, UNESCO Doc. 32C/Resolution 32.

(6) 26 March 1999, 38 *ILM* (1999) 769.

(7) 24 June 1995, 34 *ILM* (1995) 1322 (1995 UNIDROIT Convention).

(8) ALSTON, P., «The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?», en *Non-State Actors and Human Rights*, ALSTON, P. (ed.), Oxford University Press, Oxford, 2005, p. 3 ss., p. 15.

law by offering compliance procedures or extra-judicial means of dispute avoidance or dispute settlement. Private businesses –such as private museums, dealers, and auction houses– are relevant in that they represent the driving force of the international trade, furthering transactions and assembling exhibitions. Finally, armed groups must be considered. This category can be broken down into smaller groupings, such as rebels, insurgents, liberation armies, and criminal and terrorist organizations. These entities should be taken into consideration because there are multiple indications that they can be held accountable for the violation of the norms on the protection of cultural heritage.

The main objective of this article is to investigate under which circumstances and to what extent non-State actors contribute to or impinge on the protection of cultural heritage, and hence on the implementation of UNESCO treaties (section II). This analysis is premised on the beliefs that the role of NGOs, private companies, and non-State armed groups in the cultural heritage domain merits greater attention than it has received so far, and that the link between cultural heritage and these entities is a highly relevant topic of international concern. Furthermore, this article intends to unveil and discuss the ambivalent role of non-State actors. It is submitted that NGOs, private transnational companies and, arguably, non-State armed groups can be regarded, at the same time, as «defenders» and «enemies» of cultural heritage (section III). Next, this article dwells on the top-down approach currently developed by UNESCO with a view of engaging the non-State actors under consideration to respect the key tenets of cultural heritage law (section IV).

## II. EXPLORING THE SCENE: THE NON-STATE ACTORS OPERATING IN THE CULTURAL HERITAGE FIELD

### 1. NGOs

The term NGO is an all-inclusive concept encompassing everything from a neighbourhood association through an organization operating globally and is normally interpreted to include non-profit entities working for common goods. NGOs are important players on the international scene for two reasons: first, they represent stances that otherwise would be unrepresented or under-represented; second, their function is epistemic in that their influence depends on their expertise, advocacy and investigative capacity (9).

NGOs play various roles in the field of cultural heritage. Some provide services, while others concentrate on influencing governments and IOs, or raising public awareness via lobbying, campaigns, and protests. (10) Available practice also demonstrates that NGOs not only can participate in the production of soft law

(9) BHUTA, N., «The Role International Actors Other Than States Can Play in the New World Order», en *Realizing Utopia. The Future of International Law*, CASSESE, A. (ed.), Oxford University Press, Oxford, 2012, p. 61 ss., p. 74.

(10) See e.g. Europa Nostra, a NGO based in The Hague, which endeavours to safeguard Europe's cultural and natural heritage (see at: <http://www.europanostra.org/what-we-do/>).

standards, (11) national laws, and treaties, but also that they play a central role as monitoring and law-enforcement agents. (12) With regard to the latter issue, two aspects are worth mentioning. First, NGOs can plan and implement concrete action programmes, either on their own or in collaboration with other bodies. Second, these entities can act directly against States and enterprises by bringing claims or submitting friend-of-the-court briefs before national courts or international tribunals (13).

Apart from these general features and tendencies, it is worth pausing to focus on the NGOs that work in close cooperation with UNESCO's bodies: the International Council for Monuments and Sites (ICOMOS) and the International Council of Museums (ICOM).

As one of the advisory bodies to the Committee responsible for the implementation of the WHC (WHC Committee), ICOMOS is responsible for the evaluation of cultural and mixed properties proposed for inscription on the List set up under the WHC by States Parties to it and for the preparation of reports on the state of conservation of properties inscribed on such a List. (14) ICOM deals with museum concerns ranging from security to illegal trafficking. Its Code of Ethics sets standards to museums for their professional practice and performance that reflect the principles generally accepted by the international museum community (15). The fight against illicit trafficking in cultural goods is one of ICOM's priorities. For this reason it has established an International Observatory on Illicit Traffic in Cultural Goods (16), and resorts to various awareness-raising tools, such as the «Object

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(11) Various associations of art trade companies have developed ethical codes (e.g. the Code of Practice for the Control of International Trading in Works of Art; the Code of Ethics of the Association of Art Museum Directors; and the Code of Ethics of the International Association of Dealers in Ancient Art). These codes aim to reassuring the public about the standards that art merchants have agreed to observe and to provide standards of conduct to enable their members to cope with the different questions that are likely to arise when dealing with works of art.

(12) See e.g. the International Committee of the Blue Shield (ICBS). Its purpose is to promote the protection of cultural property against threats of all kinds and to intervene with decision-makers and relevant international organizations to prevent and to respond to natural and man-made disasters. See at: <http://www.ancbs.org/cms/index.php/en/about-us/about-icbs>.

(13) The traditional position in many national legal systems remains that the party or parties filling a claim must show that they have suffered or are likely to suffer injury or prejudice particular to themselves, over and above the prejudice sustained by the members of the public in general. However, various domestic courts have been willing to recognize the right to appear as a party before a court of NGOs on the grounds that the traditional view could not reasonably be applied when a public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved. MENSAH, T.A., «Using Judicial Bodies for the Implementation and Enforcement of International Environmental Law», en *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, BUFFARD, I., et al. (eds.), Martinus Nijhoff Publishers, Leiden, 2008, p. 797 ss., p. 806.

(14) See paras. 30-31, 34-35, 143-151, of the *Operational Guidelines for the Implementation of the World Heritage Convention*, WHC 13/01, July 2013. See also Articles 13(7) and 14(2) of the WHC. The International Union for the Conservation of Nature (IUCN) is the NGO that provides evaluations of natural heritage properties.

(15) The ICOM Code of Ethics for Museums was adopted in 1986 and revised in 2004. See at: <http://icom.museum/the-vision/code-of-ethics/> (accessed 15 January 2015).

(16) Established in 2013, it serves as a permanent platform and network between international organisations, law enforcement agencies, research institutions, and other stakeholders. See at: <http://obs-traffic.museum/> (accessed 15 January 2015).

Identification» (an international standard that makes the identification of endangered objects easier), the «One Hundred Missing Objects Collection» (which presents a selection of stolen works of art in a given region of the world), and the «ICOM Red Lists» (which classify the endangered categories of objects in some countries or regions of the world). Finally, it is worth mentioning that ICOM has devised a new mechanism to facilitate the settlement of cultural heritage disputes. In May 2011, ICOM launched –in collaboration with the Arbitration and Mediation Center of the World Intellectual Property Organization– a special mediation process, the Art and Cultural Heritage Mediation Program (17).

In light of the foregoing survey, it appears that NGOs perform a number of positive functions in the field of cultural heritage. However, it must be acknowledged that these non-State entities can also have a negative impact on the conservation and allocation of cultural assets. Due to restrictions in space, this study will refer only to some selected instances which seem particularly useful in clarifying the issue under consideration.

First, it must be said that the processes by which the WHC Committee reaches its decisions leading to successful inscription on the WHC List or, alternatively, deferral or referral, is heavily influenced by political and economic alliances. Various examples signal that the rules of the WHC have been bended by the WHC Committee under pressure from Member States. Ostensibly, this is one of the consequences of the fact that UNESCO is an intergovernmental organization and that the Committee is made up of State representatives (18). Corruption also undoubtedly occurs. All of this entails a disjuncture between the recommendations of the advisory bodies and the final decisions taken by the WHC Committee (19). For instance, at the Brasilia meeting of 2010, some 21 new sites were added to the WHC List, even though ICOMOS and IUCN suggested only ten were eligible (20). This trend continued at the Paris meeting of 2011, where each ICOMOS's recommendation was overturned (21). Furthermore, at the Saint Petersburg session of 2013, it appears that the ICOMOS report on the Palestinian nomination of the «Church of the Nativity and the Pilgrimage Route» became infected by the political agenda of States (22). These examples testify to the fact that, on the one hand,

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(17) See «ICOM and WIPO to Join Forces in Cultural Heritage and Museum Fields», 3 May 2011, available at: <http://icom.museum/press-releases/press-release/article/icom-and-wipo-to-join-forces-in-cultural-heritage-and-museum-fields> (accessed 15 January 2015); and CHECHI, A., «New Rules and Procedures for the Prevention and the Settlement of Cultural Heritage Disputes: A Critical Appraisal of Problems and Prospects», en *International Law for Common Goods – Normative Perspectives on Human Rights, Culture and Nature*, LENZERINI, F., y VRDOLJAK, A.F. (eds.), Hart Publishing, Oxford, 2014, p. 249 ss.

(18) The Committee is made up of 21 States Parties. These are elected at a General Assembly and serve a four-year term. Currently, it is composed of Algeria, Colombia, Croatia, Finland, Germany, India, Jamaica, Japan, Kazakhstan, Lebanon, Malaysia, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Senegal, Serbia, Turkey, and Viet Nam.

(19) BEVAN, R., «World Heritage at 40: Success or Mess?», *The Art Newspaper*, No. 240, 2012, p. 60 ss.

(20) «UNESCO's World Heritage Sites: A Danger List in Danger», *Economist*, 26 August 2010, available at: <http://www.economist.com/node/16891951> (accessed 15 January 2015).

(21) MESKELL, L., «The Rush to Inscribe: Reflections on the 35th Session of the World Heritage Committee, UNESCO Paris, 2011», *Journal of Field Archaeology*, 2012, Vol. 37, No. 2, p. 145 ss.

(22) ICOMOS recommended that Palestine should resubmit the nomination in accordance with normal procedures as the conditions for the inscription of the site on an emergency basis were not



ICOMOS is powerless with respect to the attacks against its expert status and authority. On the other hand, they demonstrate that ICOMOS can become a tool in the hands of the States that seek either to challenge old colonialisms –for instance by reversing the Western hegemony over the crafting and management of the WHC List– or to strengthen new colonialisms and dependencies –as demonstrated by the mutual support showed by four of the five BRICS States (Brazil, Russia, India, China, and South Africa) that served on the WHC Committee until 2011.

Second, various NGOs have filed actions or friend-of-the-court briefs in *opposition* to restitution of wrongfully removed art objects. The dispute concerning the sculpture *Venus of Cyrene* is a telling example. (23) At the end of the 1990s, the Italian and Libyan Governments agreed on the return of this headless marble statue to Libya. This had been removed in 1915 by Italian soldiers from the ancient Greek settlement of Cyrene following the Italian invasion of 1911. Yet, Italia Nostra, an association for the defence of Italy's historic patrimony, brought an action against the Italian Ministry of Cultural Heritage seeking to prevent the restitution. Notably, Italia Nostra's claim was grounded on the premise that the artwork in question was a component of Italian cultural heritage because it had been discovered in territory subject to Italian sovereignty. It contended that the restitution was illegitimate because it infringed the norms regulating the State's cultural patrimony. Next, the plaintiff lamented that the Ministry did not take account of the artistic and cultural value of the sculpture. It argued that the proper setting for the *Venus* was the Italian heritage and not an Islamic country. Further, Italia Nostra pointed out that the cession of the statue could create a precedent likely to cause further requests for restitution and the consequent impoverishment of the Italian patrimony. Eventually, Italia Nostra's demand was rejected and the *Venus* was returned to Libya. In particular, the Italian *Consiglio di Stato* affirmed that Italy was under an obligation to return the sculpture to Libya by virtue of (i) the bilateral agreements signed by the two governments, and (ii) a general and autonomous principle of customary international law. This principle was the corollary of the interplay between the rule prohibiting the use of force and the rule on the self-determination of peoples. The *Consiglio* explained that self-determination has come to include the right to protect both the cultural identity and the material cultural heritage linked either to the territory of a sovereign State or to peoples subject to a foreign government. Consequently, the restitution of artworks was dictated by the safeguarding of such cultural ties whenever these had been jeopardized or wiped out by acts of war or the use of force during colonial domination (24). In summary, this case evidences how an NGO pursued a legal action with no attempt to reconcile the statutory mandate – protecting the integrity of the national patrimony– with the more general obligation

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satisfied – despite the poor state of conservation of the Church. Allegedly, one of the ICOMOS experts informed the Palestinian Ambassador to UNESCO, Elias Sanbar, that the report had been modified following political pressure. SANBAR, E., «L'Eglise de la Nativité au patrimoine mondial: portée et enjeux», conference speech, 4 March 2014, available at: <http://www.art-law.org/archives/cyclepatrimoine.html> (accessed 15 January 2015).

(23) For an overview see CHECHI, A., «The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the *Venus of Cyrene*», *Italian Yearbook of International Law*, 2008, p. 159 ss.

(24) *Associazione nazionale Italia Nostra Onlus v. Ministero per i beni e le attività culturali et al.*, *Consiglio di Stato*, No. 3154, 23 June 2008, para. 4.4.

of returning wrongfully removed art objects which was incumbent upon the Italian State under international law.

Third, in the United States (US) a number of associations representing the influential community of art dealers have reacted at various times against the assistance provided to foreign art-rich countries by the federal government. In 2007, the inclusion of ancient coins on the list of designated archaeological materials in the renewal of the US-Cyprus agreement precipitated a backlash from the Ancient Coin Collectors Guild. The Guild filed a suit against the State Department seeking the release of documents pertaining to the requests for import restrictions from Cyprus (25). It can be argued that the Guild based its claims on selfish interests—as if the best repositories for Cypriot coins were the vaults of the Guild’s members—and that it overlooked two issues of archaeological methodology. On the one hand, coins are an essential part of the corpus of the archaeological data that cannot be retrieved without destroying the *stratigraphy* of a site. On the other hand, coins are of great historical and scientific importance for Cyprus because there is a lack of written sources, which instead are abundant in other areas of the Mediterranean countries (26). Moreover, in 2003, the Court of Appeals in the *Schultz* case (27) received two *amicus curiae* briefs in support of the defendant, Frederick Schultz (28). This was convicted on charges of conspiracy to receive property stolen from Egypt. The associations that filed the two briefs argued that allowing Schultz’s conviction to stand would threaten the ability of legitimate collectors to do business. This argument was dismissed by the Court of Appeals, which held that the conviction of an international smuggler of antiquities cannot hamper the lawful importation of cultural property into the United States by innocent art dealers (29). Finally, in January 2015, the Association of Art Museum Directors, which represents the directors of some of the largest and most distinguished cultural institutions in North America, opposed the renewal of a Memorandum of Understanding (MoU) between the United States and Nicaragua (30). This MoU, which was authorized by the Convention on Cultural Property Implementation Act (31), is meant to maintain import barriers on endangered

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(25) *Ancient Coin Collectors Guild v. US Department of State*, No. 1:2007 Civ. 02074, D.D.C. 2007.

(26) DIETZLER, J., «The Case for Cyprus», Interview with Flourentzos Pavlos, Director of the Department of Antiquities of Cyprus, 10 December 2007, available at: <http://www.savingantiquities.org/the-case-for-cyprus/> (accessed 15 January 2015).

(27) *United States v. Frederick Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff’d*, 333 F.3d 393 (2nd Cir. (NY) 2003).

(28) The first brief was filed by the National Association of Dealers in Ancient, Oriental & Primitive Art; the International Association of Professional Numismatists; the Art Dealers Association of America; the Antique Tribal Art Dealers Association; the Professional Numismatists Guild; and the American Society of Appraisers. The second brief was filed by a group called Citizens for a Balanced Policy with Regard to the Importation of Cultural Property.

(29) *United States v. Frederick Schultz*, 333 F.3d 393, para. 84.

(30) Association of Art Museum Directors, «Statement of the Association of Art Museum Directors Concerning the Proposed Extension of the Bilateral Agreement between the United States of America and the Republic of Nicaragua» (DOS-2014-0027-0001), 2015, available at: <http://www.regulations.gov/#!documentDetail;D=DOS-2014-0027-0005> (accessed 15 January 2015).

(31) 19 U.S.C. §§2601-2613, of 1983. With this act the United States implemented the 1970 UNESCO Convention.



heritage objects. The group's unequivocal disapproval, however, is not shared by individual experts and other NGOs, such as the Lawyers' Committee for Cultural Heritage Preservation (32).

## 2. PRIVATE COMPANIES

Private transnational companies can be defined as profit-oriented businesses operating on national and international markets and having economic interests outside the country in which they are based. In the cultural heritage field it is possible to distinguish two types of companies: (A) those that deal with cultural resources for commercial gain—such as private galleries, dealers, auction houses, and salvage companies; and (B) those that carry out industrial activities which may have a deleterious impact on cultural heritage sites—such as the companies involved in the exploitation of natural resources, especially those in the mining and petrochemical sectors. These different types of entities will be examined separately in the following sections.

### A. Art Trade Companies

Private art trade firms such as galleries, and auction houses are relevant in that they represent the driving force of the international trade in works of art and antiquities, furthering transactions, making artworks available, assembling exhibitions and researching pieces. Moreover, private galleries—just as public institutions—preserve artefacts for the benefit of present and future generations. Also, these companies foster the worldwide licit trade and the growth of the system of loans and exchanges that is essential to nourish the worldwide public interest in arts and to foster the dialogue between cultures that UNESCO advocates. Salvage companies contribute to achieve these goals too. In effect, present-day technical progress has increased the ability of well-financed treasure hunters to access historic sunken vessels lying in the world's oceans and to recover artefacts that then can be traded or showcased in exhibitions, publications, and documentaries. Furthermore, art trade firms contribute to the development of policy at both the national and international levels (33). With respect to the former issue, it is worth mentioning the agreements signed by private museums and art-rich States in the past few years (34). These deals—which should be considered as contracts rather than international treaties (35)—have permitted the repatriation of various precious antiquities and the

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(32) Lawyers' Committee for Cultural Heritage Preservation (LCCHP), «Letter in support of the request from the Government of Nicaragua to extend its Memorandum of Understanding with the United States to impose import restrictions on archaeological materials from the pre-Hispanic cultures of the Republic of Nicaragua» (DOS-2014-0027-0004), available at: <http://www.regulations.gov/#!documentDetail;D=DOS-2014-0027> (accessed 15 January 2015).

(33) See the ethical codes adopted by the associations of art trade firms, *supra* n. 11.

(34) See e.g. the agreements concluded by the Italian Government with the Boston Museum of Fine Arts, the New York Metropolitan Museum of Art, the J. Paul Getty Museum of Los Angeles, Princeton University's Art Museum, and the Cleveland Museum of Art.

(35) SCOVAZZI, T., «*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties», *Rivista di diritto internazionale*, 2010, p. 341 ss., p. 380.

establishment of programmes of cultural cooperation involving, *inter alia*, reciprocal loans, the sharing of information about potential future acquisitions, and collaboration in the areas of scholarship, conservation, and archaeological investigation. These agreements, even if they cannot set legal precedents like court judgments, have affected the climate of the art world. In effect, this type of accord has come to constitute a model not only to foster cooperation between States in the fight against illicit trade, but also to achieve efficient out-of-court settlements.

However, it is also true that art business firms can betray their own professed culture-sensitive goals by engaging in illicit or unethical conduct. In effect, art dealers and auction houses have often been accused of obscuring the true origins of art objects through their confidentiality clauses, thereby favouring thieves and the criminal organizations that resort to art trade for laundering the proceeds of their illicit activities. In addition, businesses have often been implicated in cases over stolen or looted objects. It suffices to mention two cases. The first is the *Goldberg* case. (36) This case originated when Peg Goldberg, a US art dealer, acquired four 6th century mosaics from some dubious sellers in the freeport area of the Geneva airport. Goldberg shipped the mosaics to Indiana and then she tried to sell them. As a consequence, the Church of Cyprus traced the mosaics. It alleged that the mosaics had been removed from the Cypriot Church of the *Panagia Kanakaria* in *Lythrankomi* following the Turkish invasion of 1974. The Church offered Goldberg the reimbursement for the purchase price in exchange for their restitution. She refused, so the Church instructed their attorneys to file suit. Eventually, the mosaics were awarded to the plaintiff. The second is the criminal prosecution in Italy of Marion True, the former antiquities curator of the J. Paul Getty Museum. She was indicted in 2005 for conspiracy to traffic in antiquities from Italy to the United States. Her trial ended on 13 October 2010 when the Rome Tribunal ruled that the statute of limitations had expired. (37) On the other hand, the *Black Swan* dispute between Odyssey Marine Exploration and Spain (38) demonstrates that the recovery of underwater archaeological materials carried out by treasure hunters provokes the de-contextualization of such resources as well as the loss of essential historical and scientific information. In effect, among archaeologists there is a commitment to

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(36) *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, 717 F.Supp., 1374, S.D.Ind. (1989), *aff'd*, 917 F.2d 278, 7th Cir. (1990).

(37) FELCH, J., «Charges Dismissed against ex-Getty Curator Marion True by Italian Judge», *Los Angeles Times*, 13 October 2010.

(38) *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011). This dispute began when Odyssey Marine Exploration announced the recovery of a collection of coins and other artefacts from a 19th century shipwreck, code-named *Black Swan*. The company did not disclose the identity of the wreck nor its exact location, but transferred the treasure to Florida. It only admitted to have discovered it beyond the legal jurisdiction of any country. Spain suspected the coins came from the *Nuestra Señora de las Mercedes*, a frigate that was sunk by British gunboats in 1804. Accordingly, Spain filed an ownership claim in the Federal Court in Florida. In 2011, the 11th US Circuit Court of Appeals determined that the wreck was the *Mercedes* and that it was Spain's sovereign property. As a result, it confirmed that Odyssey should release to Spain the items recovered from the *Black Swan*. It thus appears that the US Court set a precedent limiting the activities of treasure hunters and confirming the 2001 UNESCO Convention's basic principles. Interestingly, a number of other salvage companies submitted *amici curiae* briefs to the Court of Appeals (Historic Shipwreck Salvors Policy Council, the Institute of Marine Archaeological Conservation, and Fathom Exploration). These argued for the respect of the ancient freedom of the seas to search for and rescue distressed property.

preserve the context where objects are found. Archaeology considers virtually useless an object deprived of its context. In addition, the unscientific digging aimed at commercial exploitation carried out by salvage companies is at variance with the basic principles contained in the 2001 UNESCO Convention: (i) «preservation in situ [the current location on the seabed] [...] shall be considered the first option» (Article 2(5)); and (ii) «[u]nderwater cultural heritage shall not be commercially exploited» (Article 2(7)).

## B. Other Companies

Generally speaking, companies contribute to enhance the social welfare of the community that resides in the areas where these entities carry out their economic activities. For instance, an increase in the number of factories and industries in operation in a given territory increases the number of jobs and hence the standards of living in the nearby urban areas.

However, the negative outcomes from such industrial activities –such as pollution– and the pressure for high-density urbanization resulting from the influx of population can lead to the deterioration of historic property and to the disruption of the traditional fabric. Moreover, certain economic activities bring about *ipso facto* the deterioration of the environment in general and of cultural heritage in particular. This is the case of the realization of large-scale projects –such as highways, dams, or pipelines– or the exploitation of natural resources –such as mining and oil extraction (39). Accordingly, the question arises as to whether economic growth should have priority over the protection of cultural resources. Or, to put it another way, the question is whether the exigencies of modernity, on the one hand, and the conservation of ancient monuments, on the other, can be reconciled. Indeed, it can be argued that development projects should be realized by taking account of the cultural manifestations that give substance and identity to the environment where they are carried out.

Various domestic courts' and international arbitral tribunals' decisions remind us that large-scale works undertaken by development-minded government authorities may imperil cultural spaces (40). Others cases have been resolved through negotiations involving local or national political authorities and in some cases international organizations (41). Many are still pending and attract headlines as they involve the serious clash between the right of States to develop freely and the

(39) See NAFZIGER, J.A.R., «The World Heritage Convention and Non-State Actors», en *Realising Cultural Heritage Law. Festschrift for Patrick O'Keefe*, PROTT, L.V., REDMOND-COOPER, R., y URICE, S. (eds.), Institute of Art and Law, Pentre Moel, 2013, p. 73 ss.

(40) See e.g. the cases: *Coal Contractors Limited v. Secretary of State for the Environment and Northumberland County Council* (United Kingdom, QBD, 9 December 1993); *Tikiri Banda Nulankulama v. Secretary, Ministry of Industrial Development* (Sri Lanka, 884/99, 2000); *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/08, Award of 11 September 2007); and *Glamis Gold Ltd. v. United States* (NAFTA Tribunal, Award of 16 May 2009).

(41) See e.g. the cases concerning Dampier Rock Art (HELMUTH, L., «Dampier Rock Art Complex, Australia», *Smithsonian*, March 2009), Kakadu National Park (VADI, V., *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press, Cambridge, 2014, p. 216 ss.), and the Church of Heuersdorf (VADI, V., «Cultural Heritage and International Investment Law: A Stormy Relationship», *International Journal of Cultural Property*, 2008, pp. 1-24, 6-7).

State's obligations under the WHC (42). In other cases, the fate of significant sites has been decided by the invisible market hand: in Mecca, ancient sites have been bulldozed by developers because the Saudis wanted to turn the spiritual heart of Islam into an ultramodern enclave (43); in Mes Aynak, a rich archaeological site will be razed as a result of the re-opening of an ancient copper mine which is the object of a US\$3billion deal between the Afghan Government and a Chinese corporation. (44)

However, industry has not remained indifferent to the calls for an increased protection of cultural heritage sites. A number of transnational corporations have undertaken to avoid extractive and other deleterious activities in or in the proximity of cultural sites. Although these «no-go pledges» may derive from direct initiatives by companies, they may be required by prospective insurers or lenders (45). This means that, to some extent, the WHC standards are being internalized by companies. An interesting example comes from Italy. Notwithstanding the obligations under the WHC to protect and preserve the Late Baroque Towns of the Val di Noto in South-Eastern Sicily, local authorities granted a US investor, Panther Oil, a concession to drill gas within the WHC site. As is well known, the site is in permanent danger of earthquakes. Therefore, drilling is risky because it could cause the deterioration if not the collapse of the baroque churches making up this stunning WHC site. In the face of the drilling concession, which was upheld by a regional administrative court's ruling, and of the Italian Government's intervention to halt the project, Panther Oil decided to exploit the concession outside the Valley (46). Another example is provided by the International Council on Mining and Metals (ICMM). Cognizant of the tension between the economic benefits of mineral and hydrocarbon extraction and a State's obligations under the WHC, in 2003 this body published a Position Statement whereby ICMM company members expressly committed to «not explore or mine in World Heritage Properties» (47). In addition, many companies actively contribute to the implementation of the WHC pursuant to the World Heritage Partnerships for Conservation Initiative (PACT). Their contribution consists of sharing their know-how and providing training, expertise, and funding for awareness-raising and conservation projects. This initiative between the WHC Centre and the private sector (i) reflects a commitment to long-term management of sites inscribed on the WHC List, and (ii) is crucial in view of the vul-

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(42) High-profile commercial developments affect WHC sites in e.g. London, Liverpool, Seville, Moscow, and St. Petersburg. See BEVAN, R., «Global Heritage on the Back Foot», *The Art Newspaper*, 252, December 2013, Special section, p. 16.

(43) SPARROW, J., «If Great Architecture Belongs to Humanity, Do We Have a Responsibility to Save It in Wartimes?», *The Guardian*, 7 October 2014.

(44) NAFZIGER, J.A.R., «The World Heritage Convention...», *op. cit.*, p. 78.

(45) AFFOLDER, N., «The Private Life of Environmental Treaties», *American Journal of International Law*, 2009, p. 510 ss., 521.

(46) VADI, V., *Cultural Heritage...*, *op. cit.*, p. 251.

(47) International Council on Mining and Metals, «Mining and Protected Areas», Position Statement, September 2003, available at: <http://www.icmm.com/publications?rootTagId=95> (accessed 20 January 2015). See also TURNER, S.D., «World Heritage Sites and the Extractive Industries», available at: <http://www.icmm.com/library/independent-report-world-heritage-sites-and-the-extractive-industries> (accessed 20 January 2015).

nerability of many sites due to uncontrolled urban development, unsustainable tourism practices, neglect, natural calamities and pollution (48).

### 3. NON-STATE ARMED GROUPS

The label non-State armed groups comprise a host of different entities such as rebels, insurgents, liberation armies, and criminal and terrorist organizations. The problems posed by the organized violence of these groups are far from novel in international law (49). Nevertheless, their legal status as subjects of international law remains ambiguous. This is due to the fact that States have an interest in maintaining wide discretion in their dealings with these entities and in having the last word as to whether and when to confer political and legal significance to their existence (50). There is general consensus only on the fact that these fighters are bound by certain treaty-based norms of international humanitarian law and human rights law, even if they are not formal parties to such treaties. In particular, these entities are obliged to respect certain minimal standards that mostly aim at controlling their conduct vis-à-vis other combatants and civilians (51). A violation of these standards entails collective responsibility and individual criminal responsibility.

In the classical narrative, non-State armed groups are ranked among the main threat actors. There is no doubt that this picture is to a large extent correct. Not only do militants place human security in jeopardy, they also cause the destruction, deterioration, or alteration of artefacts, monuments, and sites. In Afghanistan, the Taliban destroyed with anti-aircraft guns and dynamite the two monumental 6th century Buddhas of Bamiyan based on a fanatic iconoclastic delirium that *shari'ah* mandated the destruction of all idols. The Taliban did not accept the vision put forward by various prominent Muslim clerics that such an interpretation of the law was wrong because the statues were not idols but «historical legacies» (52). In

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(48) See World Heritage Partnerships for Conservation Initiative, information available at: <http://whc.unesco.org/en/partnerships/> (accessed 20 January 2015).

(49) See e.g. KRITSIOTIS, D., «International Law and the Violence of Non-State Actors», en *International Law and Power. Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick*, KAIKIBAD, K.H., y BOHLANDER, M. (eds.), Martinus Nijhoff Publishers, Leiden, 2009, p. 343 ss.; and RYNGAERT, C., «Non-State Actors in International Humanitarian Law», en *Participants in the International Legal System*, D'ASPREMONT, J. (ed.), Routledge, London, 2011, p. 284 ss.

(50) BHUTA, N., «The Role International Actors...», *op. cit.*, p. 74.

(51) The requirement that non-State armed groups respect, as a minimum, certain rules of international humanitarian law applicable in non-international armed conflicts is set forth in common Article 3 of the Geneva Conventions of 12 August 1949 (*Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS (1950) 31; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS (1950) 85; *Convention (III) relative to the Treatment of Prisoners of War*; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 75 UNTS (1950) 135). This requirement is also set forth in the Protocols Additional to the Geneva Conventions (*Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I)*, 1125 UNTS (1979) 3; and *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 UNTS (1979), 609) and in the 1954 UNESCO Convention.

(52) WANGKEO, K., «Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime», *Yale Journal of International Law*, 2003, p. 183 ss., p. 249.



Mali, *Ansar Dine*, an Al-Qaeda-related terrorist organization, took control of Gao, Kidal, and Timbuktu in early 2012. The latter city was inscribed on the WHC List in 1988 because it is the home of various extraordinary monuments which represent the legacy of Mali's rich history. In June 2012, *Ansar Dine*'s warlords ordered the destruction of the mosques, tombs of ancient Muslim saints, and other cultural treasures of inestimable historical value by saying that they were idolatrous and contrary to their strict interpretation of Islam (53). In Libya, ultra-conservative Salafis attacked a mosque containing Sufi Muslim graves in the center of Tripoli and set fire to a library containing rare academic and religious manuscripts (54). In Iraq, the Islamic State of Iraq and Syria (ISIS) has demolished by bulldozers or by explosives ancient sites and shrines to wipe out the traditions they represent. Moreover, it has organized the plundering of archaeological objects to generate revenues to finance terrorist activities (55).

In spite of the above, one may still question whether pigeonholing non-State armed groups as enemies of cultural heritage is accurate. This is an assumption worth questioning because in the above cases the targeting of cultural resources was not against cultural heritage *per se*, but it was allegedly motivated by ideological or religious reasons. Stated differently, iconoclasm is used by non-State armed groups as a medium to promote their own vision of the past and the present. Yet this is nothing new. History provides us with numerous examples of iconoclastic fervour. For instance, from the 8th to 9th century, Christian iconoclasts destroyed images of Christ in Byzantium because they disagreed with the use of images as objects of worship. To take another example distant in time and place, at the beginning of the 15th century, the Aztec emperor Itzcoatl commanded the destruction of all steles and all books only for rewriting tradition according to his own view. During colonialism, the wholesale taking of art treasures by the British Empire was justified by the savagery of the colonized and Britain's political and military power. During the French Revolution, the revolutionaries attempted to destroy all artworks and monuments connected with the king in order to delegitimize the *ancien régime*. Similarly, when the Bolsheviks took control of Russia in 1917, they moved to demolish all pre-revolutionary monuments (56). In summary, it can be argued that there is no difference between today's Islamic iconoclasm and past examples of destruction: in both cases symbols belonging to other cultures have been attacked in order to obliterate the message which was imbued in such objects. Pushing this argument to its extreme, it can be affirmed that the museums, art dealers and collectors that buy unprovenanced art objects are just like the armed fundamentalists that organize and profit from the looting. Both share an identical indifference to the

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(53) MARK, M., «Malian Islamists Attack World Heritage Site Mosques in Timbuktu», *The Guardian*, 2 July 2012, available at: <http://www.theguardian.com/world/2012/jul/02/mali-islamists-attack-world-heritage-mosques-timbuktu> (accessed 20 January 2015).

(54) ZARGOUN, T., «Fighters Bulldoze Sufi Mosque in Central Tripoli», *Reuters*, 25 August 2012, available at: <http://www.reuters.com/article/2012/08/25/us-libya-islamists-idUSBRE87O08Y20120825> (accessed 20 January 2015).

(55) ERCIYES, C., «Islamic State Makes Millions from Stolen Antiquities», *Al Monitor*, 2 September 2014, available at: <http://www.al-monitor.com/pulse/security/2014/09/turkey-syria-iraq-isis-artifacts-smuggling.html> (accessed 20 January 2015).

(56) WANGKEO, K., «Monumental Challenges...», *op. cit.*, p. 192.



historical and scientific record embedded in cultural resources and to their value to humanity as a whole (57).

Of course, the fact that iconoclasm is not new is not sufficient to justify the episodes of destruction provoked today by extremists armed groups on the ground of flawed or fraudulent motivations. For one thing, today there exists a number of clear and well-established rules enjoining governments and other entities to respect and safeguard monuments, sites and artefacts. This contentious perspective has been discussed in order to emphasise two points. First, non-State armed groups have preferences when it comes to cultural heritage. Second, non-State armed groups' preferences can nevertheless result in the protection of the cultural resources. This is the case when groups that fight for self-determination, within the State (after having removed the incumbent government) or within a new State (to be formed through secession), strive to protect iconic and representative items of cultural heritage which are vital to their ideologies as these can be used to build the foundation of a new nation (58). An example is provided by the Kurdistan Workers' Party (PKK). As is well known, this militant organization fought an armed struggle against the Turkish State from 1984 to 2013 seeking self-determination for the Kurds. Regardless of its goals, the PKK has been regarded by States and international organizations as a terrorist organization. However, the PKK has consistently worked for the preservation of the monuments, artefacts and, above all, the intangible heritage (their language, folklore, music and celebrations) of the Kurds located in Turkey, Iraq, and Syria (59).

### III. AN APPRAISAL

The foregoing discussion naturally leads to consider a number of crucial traits that typify the link between the involvement of non-State actors in international affairs, on the one hand, and the enforcement of the UNESCO treaties on the protection of tangible cultural heritage, on the other.

The first consideration relates to the fact that, despite the proliferation of non-State entities, States remain the primary protagonists on the international scene. Consequently, States still constitute the highest authority within their territory. This means that it is primarily for States to regulate the activities of non-State actors based and/or operating within their jurisdiction. This entails that, for instance, NGOs' participation in the work of international organizations depends on the accordance given by the States members of these international organizations (60). Similarly, with respect to the issues of law-making, it must be observed that, from

(57) See also SPARROW, J., «If Great Architecture Belongs to Humanity...», *op. cit.*

(58) In this respect, there is no difference between States and non-State entities given that leaders and dictators have often used the vestiges of ancient past and cultural commonalities to fortify their leadership and to build a cohesive national identity.

(59) See e.g. BENGIO, O. (ed.), *Kurdish Awakening – Nation Building in a Fragmented Homeland*, University of Texas Press, 2014; and TEJEL, J., *Syria's Kurds: History, Politics and Society*, Routledge, Abingdon, 2009, pp. 102-107.

(60) RANJEVA, R., «Les organisations non gouvernementales et la mise en œuvre du droit international», *Collected Courses of the Hague Academy of International Law*, 1997, Vol. 270, p. 9 ss.

a legal perspective, non-State actors do not enjoy full international legal personality. They cannot create international binding law and hence States remain the exclusive international-law makers. In the absence of special arrangements, non-State actors may only function as lobbyists, consultants or otherwise catalyse the formation of binding international law (61).

Second, it is crystal clear that NGOs, private companies, and non-State armed groups have an impact on the implementation of international cultural heritage law. Various treaties, soft law documents, policy statements and court decisions demonstrate that these entities have the potential to both enhance the enforcement of cultural heritage law and to place cultural heritage resources in jeopardy.

This leads to the third consideration, namely that the non-State actors analysed in the preceding sections have an *ambivalent* role in the cultural heritage domain: NGOs, private transnational companies and, arguably, non-State armed groups, cannot be classified *a priori* as «defenders» («rescue» actors) or «enemies» («threat» actors) of cultural heritage.

Fourth, it must be emphasised that the acquisition of governance roles by non-State actors in the implementation of international cultural heritage law has not been accompanied by a definition of their rights, duties, and responsibilities. One reason is that the existing international legal regime has developed along State-centric lines. Non-State actors are not eligible to enter into UNESCO treaties. These conventions provide these entities with no obligation or mere non-self-executing duties. A similar problem affects the private code of ethics adopted by private art trade firms and their representative associations. While these self-adopted standards could be a useful source of self-control on the art market, they seem not to be numerous, are often vague or ambiguous, and are often neither adhered to nor enforced.

In summary, it appears that States have failed to create adequate measures to address the many challenges posed by non-State actors to the effective enforcement of international cultural heritage law norms.

#### IV. ENGAGING NON-STATE ACTORS

Having delineated some of the most salient issues about non-State actors' involvement in cultural heritage law and practice, it is now time to discuss whether and how the existing legal regime should be further developed to address the challenges posed by these entities. In this regard, it is worth focusing on a statement issued in December 2012 by Irina Bokova, the Director-General of UNESCO (62). She declared to be aware of existing challenges and the heavy criticisms moved

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(61) D'ASPREMONT, J., «International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?», en *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers*, NOORTMANN, M., y RYNGAERT, C. (eds.), Ashgate, Farnham, 2010, p. 171 ss., p. 178 ss.

(62) BOKOVA, I., «Culture in the Cross Hairs», *The New York Times*, 2 December 2012, available at: [http://www.nytimes.com/2012/12/03/opinion/global/cultural-sites-must-be-protected.html?\\_r=1&](http://www.nytimes.com/2012/12/03/opinion/global/cultural-sites-must-be-protected.html?_r=1&) (accessed 21 January 2015).

against UNESCO. Indeed, this Organization is often criticized for being toothless in the face of conflicts ravaging heritage sites and of the economic and political power of reckless pro-development lobbies (63). However, Irina Bokova affirmed that UNESCO is now determined to heighten the efficacy of the legally binding international treaties adopted since 1954 and to strengthen the capacities of States to do so. One of the strategies envisaged by UNESCO is to fortify dialogue and cooperation with non-State actors, such as museums, international auction houses, art dealers, customs authorities, the police, and armed (64). UNESCO needs to prove that it is responsive and sufficiently flexible to keep pace with the rising and ambivalent roles of these and other non-State actors.

Rather than being prescriptive, the examination that follows aims at narrating some of the elements of the top-down strategy that UNESCO is currently developing to engage the non-State actors under review to respect the key obligations set forth in cultural heritage treaties.

First of all, it is worth recalling that, as a UN organization specialized in the field of culture, UNESCO has built up over the years a valuable network of cooperative relations in its fields of competence with various NGOs. Under Article XI(4) of its Constitution (65), UNESCO can establish two main types of relations: the first involves cooperation both upstream and downstream from UNESCO's programming and priorities (formal relations); the second consists of a flexible and dynamic partnership in the implementation of UNESCO's programmes (operational relations). These relations aim, on the one hand, to enable UNESCO to secure advice, technical cooperation and documentation from NGOs and, on the other hand, to enable such organizations to express the views of their members (66).

Geneva Call is an NGO with which UNESCO is seeking to establish a relation for the protection of cultural heritage from iconoclastic acts and the fallout from armed conflict. Established in 2000, this Geneva-based NGO is dedicated to promoting respect by non-State armed groups for international humanitarian norms in armed conflict and other situations of violence. Initially Geneva Call focused only on the ban on anti-personnel mines. Then it expanded its scope of activity into the protection of children in armed conflict –notably from recruitment and use in hostilities– as well as the prohibition of sexual violence and gender discrimination. The key tool of engagement that Geneva Call uses is a «Deed of Commitment». Essentially, it engages in dialogue with non-State armed groups and convinces them to sign a «Deed of Commitment», which refers to specific international

(63) BEVAN, R., «World Heritage at 40...», *op. cit.*.

(64) BOKOVA, I., «Culture...», *op. cit. supra* n. 62.

(65) «Organization UNESCO may make suitable arrangements for consultation and co-operation with non-governmental international organizations concerned with matters within its competence, and may invite them to undertake specific tasks. Such co-operation may also include appropriate participation by representatives of such organizations on advisory committees set up by the General Conference».

(66) Directives Concerning UNESCO's Partnership with Non-Governmental Organizations, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=33137&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#5](http://portal.unesco.org/en/ev.php-URL_ID=33137&URL_DO=DO_TOPIC&URL_SECTION=201.html#5) (accessed 21 January 2015).

humanitarian norms. To date 53 non-State armed groups have signed «Deeds of Commitment» and have overall respected the obligations provided therein (67).

In 2014, UNESCO invited Geneva Call representatives to Beirut on the occasion of a training activity on the fight against the illicit traffic of Syrian cultural objects. This training was dedicated to police and customs officers from Syria and neighbouring countries, and focused on archaeological sites, museums security and theft prevention, but also on national and international legal instruments. Crucially, the training also included practical experiences on how Geneva Call operates on the field (68). Given that cultural resources are vanishing at an alarming rate in the conflict zones in the Middle East, it is to be expected that Geneva Call will become an arm of UNESCO by extending its field of activity to the enforcement of the treaty-based rules and the international customary law norms on the protection of cultural heritage. In the alternative, UNESCO should strive to put into practice by its own means the innovative and constructive method developed by this NGO. Either way, the effect of engaging non-State armed groups to respect the prohibition on looting artefacts could have an important –albeit slow and indirect– regulatory impact on the international art trade, namely a diminution of the supply of undocumented objects. As is well known, in times of social upheaval, the increase in the looting and illicit exportation of cultural resources is accompanied –if not preceded– by an increase in the demand for such materials by middlemen, unethical dealers, and collectors. Therefore, an intervention in support of preservation efforts in combat zones seems essential to curtail the detrimental effects of the economic law of supply and demand.

However, it is clear that an effective protection of cultural heritage also requires incisive action at the domestic level aimed to control and discipline effectively the demand side of the market. First, States should introduce clearer legal prohibitions and stronger punitive measures criminalizing all activities related to trafficking in cultural objects. Penalties such as fines or imprisonment should be increased. In addition, punitive measures should be applied effectively and more widely, that is, not only against criminals –be they tomb raiders, thieves, or smugglers– but also against purchasers –be they art professionals or dilettanti. The law should impose a cost on those who contribute directly or indirectly to the looting of sites (69). For the deterrent effect of the legal regime to be most effective, the risk of detection and the certainty and severity of punishment must be high (70). Second, States should promote specialized training for law enforcement officers –police, customs, border officers, judges, and prosecutors. Third, national authorities should design initiatives to increase awareness among individuals and to stigmatize cultural vandalism. It is only when people feel a stake in the local heritage and can appreciate the achievements of their forebears that they become willing to get involved in the

(67) See the web site of Geneva Call: <http://www.genevacall.org/who-we-are/> (accessed 22 January 2015).

(68) See «Training to Fight against the Illicit Trafficking of Syrian Cultural Properties», available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/capacity-building/arab-states/beirut-2014/> (accessed 22 January 2015).

(69) GERSTENBLITH, P., «Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past», *Chicago Journal of International Law*, 2007-2008, p. 169 ss., p. 174.

(70) MACKENZIE, S.M., *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Institute of Art and Law, Leicester, 2005, p. 21.

heritage's safeguarding and in the fight for its survival. On the one hand, States should disseminate information on the importance of protecting the artistic patrimony of the nation and on the damage caused by destruction, theft, and illicit excavations. Local communities should be made aware that the money received for looted antiquities is small compared to the price paid for them in destination markets, and that the local artistic and historical patrimony represents a finite resource that should be taken care of to ensure the development of the territory. In many art-rich countries, such awareness-raising campaigns have bolstered local pride and resulted in a considerable reduction in clandestine excavations (71). National authorities should also encourage citizens to report finds and denounce tomb raiders. On the other hand, the empowerment of civil-society groups in unstable countries can be vital to counter violent extremism if they are provided with training and support to: developing a neighbourhood watch; responding to threats with non-violent social-mobilization techniques; engaging in media and other social campaigns to raise awareness; and disempowering and delegitimizing the radical ideologies of extremists (72). The importance of local communities' empowerment in the protection of cultural heritage is demonstrated by recent episodes occurred in Egypt (73), Mali (74), and Syria (75).

Another interesting component of the top-down approach espoused by UNESCO relates to an ongoing initiative concerning the adoption of a recommendation on the protection and promotion of museums and collections. This initiative originates from the desire to supplement and extend the application of the standards and principles laid down in existing international instruments. It must be noted that the draft recommendation, which is being prepared by UNESCO and ICOM, looks at museums in their dual dimension. On the one hand, museums should be protected because they are important today at the social and cultural levels and because they are targeted by criminals and armed forces. On the other hand, museums are also regarded as actors that can be involved in illicit trafficking. For this reason the draft recommendation provides standards of best practice, such as that of «due diligence» to prevent acquisition of stolen items, as established by the 1995 UNI-

(71) O'KEEFE, P.J., *Trade in Antiquities. Reducing Destruction and Theft*, Archetype Publications and UNESCO, London, 1997, p. 89 ss.

(72) MIRAHMADI, H., «Salafist Movements Threaten World Cultural Heritage», *Al Monitor*, 15 November 2012, available at: <http://www.al-monitor.com/pulse/originals/2012/al-monitor/salafists-threaten-culture.html#> (accessed 22 January 2015).

(73) Where a chain of heroic civilian stepped up around the Cairo Museum to fend off looters trying to poach prized artifacts. See CARBONE, N., «Egypt's Human Chain: The Race to Save the Mummies», *Time*, 31 January 2011, available at: <http://newsfeed.time.com/2011/01/31/egypts-human-chain-the-race-to-save-the-mummies/> (accessed 23 January 2015).

(74) Where a network of volunteers removed some 350,000 ancient manuscripts from public institutions to save them from the iconoclast fury of Ansar Dine. See «Mali's Religious Scholars Cunningly Save Ancient Islamic Manuscripts from Salafist Fighters in Timbuktu», *The Independent*, available at: <http://www.independent.co.uk/news/world/africa/malis-religious-scholars-cunningly-save-ancient-islamic-manuscripts-from-salafist-fighters-in-timbuktu-8483952.html> (accessed 24 January 2015).

(75) Where local communities all over the country have mobilized themselves with the objective to provide security in archaeological sites and museums, and to help recover looted items. See «Syrian Citizens Protect Their Cultural Heritage», available at: <http://www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/national-initiatives/syrians-protect-their-heritage/> (accessed 21 January 2015).

DROIT Convention and the 1970 UNESCO Convention. In addition, it emphasises that States should accept the legal principles contained in cultural heritage treaties and that museums should implement rigorously the ICOM Code of Ethics (76).

In connection to this, it must be stressed that the 1970 UNESCO Convention has long begun to reconfigure the attitude of the major market players. Indeed, the year 1970 is now widely accepted as a cut-off date by non-governmental museums, auctions houses and dealers. This means that artworks that cannot be proved to have entered the market before 1970 fail to sell if not accompanied by export certificates or other documents proving their licit provenance. This also means that the 1970 UNESCO Convention is effectively being implemented not only by international institutions and national enforcement bodies but also by art trade professionals, fearful that the legitimate ownership of their acquisitions may be challenged in the future (77).

As shown above, the 1972 WHC has come to exercise a similar form of indirect control on companies operating in the sectors from which most threats for cultural heritage assets originate. This is motivated by the fact that where an investor's activities endanger a WHC site and the State Party fails to take remedial action (or is even responsible for the harm along with the investor), the WHC Committee has limited means to intervene. It cannot force States to comply with their obligations under the 1972 Convention, nor can it legally penalize them. The Committee has only «soft remedies» at its disposal (78). For instance, the WHC Committee can publicly admonish State Parties in breach of their obligations. Thus, for instance, at its 36th session, with respect to energy and mining operations, the Committee reprimanded the States that have granted concessions or exploration licenses for areas that encroached on WHC sites and urged these States to cancel such permits and/or to refrain from issuing such permits in the future (79). Such censure can in turn cause cuts in funding, both from the WHC Fund and other sources. Moreover, the WHC Committee can also appeal companies whose actions threaten listed sites. For instance, those carrying out petroleum and mining operations within certain sites (80). The WHC Committee has thus the power to cast bad

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(76) The draft Recommendation will be examined at the intergovernmental meeting that will be held at UNESCO Headquarters in May 2015. See at: <http://www.unesco.org/new/en/culture/themes/museums/recommendation-on-the-protection-and-promotion-of-museums-and-collections/> (accessed 23 January 2015).

(77) MELIKIAN, S., «Antiquities, With a Proven Record, Drive Auction Market», *The New York Times*, 14 June 2013, available at: [http://www.nytimes.com/2013/06/15/arts/15iht-melikian15.html?\\_r=0](http://www.nytimes.com/2013/06/15/arts/15iht-melikian15.html?_r=0) (accessed 23 January 2015).

(78) See FRANCONI, F., «International 'Soft Law': A Contemporary Assessment», en *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, LOWE, V., y FITZMAURICE, M. (eds.), Cambridge University Press, Cambridge/New York, 1996, p. 167 ss.

(79) See e.g. the decisions adopted by the WHC Committee at its 36th Session, Saint Petersburg 2012 (WHC-12/36.COM/19): para. 7a.5 (re *Kahuzi-Biega National Park*, Democratic Republic of the Congo); para. 7a.13 (re *Tropical Rainforest Heritage*, Indonesia); para. 7a.8 (re *Okapi Wildlife Reserve*, Democratic Republic of the Congo); and para. 7a.4 (re *Virunga National Park*, Democratic Republic of the Congo).

(80) See e.g. the decisions adopted by the WHC Committee at its 38th Session, Doha 2014 (WHC-14/38.COM/16): Decision 38 COM 7, para. 9: «Welcomes the commitment made by TOTAL in June 2013 not to explore or exploit oil or gas inside sites inscribed on the World Heritage List as well as the new policy on World Heritage Sites adopted by the investment bank HSBC not to knowingly provide financial services to support projects which threaten the special characteristics of World



publicity not only on the actions of States, but also on the investors in those States, thereby damaging their reputation.

## V. CONCLUSION

It has been another year of living dangerously for the world's historical and artistic patrimony. Armed conflict and political instability in the Middle East and North Africa still represent a great threat for cultural resources. In other parts of the world, a combination of financial-crisis austerity and rampant neo-liberal development models brings about further deleterious consequences for cultural heritage protection and conservation. It is as if the notion of common good that underpinned the standard-setting activity of UNESCO and of other international organizations is being discarded as a cumbersome burden (81).

In the face of this gloomy state of affairs, this article has examined the question of the enforcement of the UNESCO treaties on the protection of tangible cultural heritage from the perspective of non-State actors. This assessment has permitted to unveil the ambivalent role of NGOs, private companies, and non-State armed groups, and to examine the top-down approach currently developed by UNESCO with a view of engaging these entities to respect the key tenets of cultural heritage law. The rationale underlying this top-down strategy corresponds to the compelling need to formulate adequate incentives, soft enforcement procedures, and systems of accountability in order to maximise compliance with norms, principles, and standards. The international community's aspiration to protect cultural treasures will be compromised if UNESCO and the other authorities overseeing the implementation of the existing legal regime fail to devise effective arrangements to take adequate account of the ambivalent role of NGOs, private companies, and non-State armed groups.

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Heritage properties and, also taking note of the discussions held between the World Heritage Centre, IUCN and International Petroleum Industry Environmental Conservation Association, calls on other companies in extractive industries and investment banks to follow these examples to further extend the 'No go' commitment».

(81) BEVAN, R., R., «Global Heritage...», *op. cit.*

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